IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 22ND FEBRUARY 2007 / 3RD PHALGUNA 1928

RSA.No. 3 of 2007()
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AS.17/2003 of SUB COURT, KASARAGOD
OS.495/1997 of PRL.MUNSIFF, KASARAGOD
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APPELLANTS/APPELLANTS/DEFENDANTS:
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1. K. CHOMA NAIKA, S/O.LATE APPU NAIKA,
   KADAMANE IN BADIADKA VILLAGE,
   KASARGODE TALUK, P.O. PERDALA.

2. KORAGA NAIKA, S/O.LATE APPU NAIKA,
   KADAMANE IN BADIADKA VILLAGE,
   KASARGOD TALUK, P.O. PERDALA.

3. KAMALA, W/O.MAHALINGA NAIKA,
   KEDIRJE, BADIADKA, VILLAGE,
   KASARGODE TALUK, P.O. PERDALA.

4. SHARADA, W/O.KRISHNA NAIKA,
   KARKATA KOLLYA HOUSE,
   NETTARIGE VILLAGE, KASARGODE TALUK,
   P.O. NELLEKALLU, VIA MULLEIA.

BY ADV. SRI.V.V.ASOKAN
SMT.S.AMINA

RESPONDENTS:
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RAMA NAIKA, S/O.MAHALINGA NAIKA,
KADAMANE IN BADIADKA VILLAGE,
KASARGODE TALUK, P.O.PALLATHODKA.

BY ADV. SRI.K.SHRIHARI RAO
SMT.N.SHOBHA

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 22/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO.7/07 IN RSA 3/07

DISMISSED

22/2/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

**M.SASIDHARAN NAMBIAR,J.**

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R.S.A .NO. 3 OF 2007

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Dated 22nd February 2007

**J U D G M E N T**

Defendants in O.S.495/97 on the file of Principal Munsiff court, Kasargod are appellants. Respondent is plaintiff. Respondent instituted the suit seeking a decree for recovery of possession of plaint B schedule property with mesne profits. Case of respondent was that plaint schedule property was originally government land and was assigned to him by Government and plaint B schedule property is part of plaint A schedule property and father of appellant had earlier filed O.S.131/87 before Munsiff court, Kasargod and in that suit it was found that plaint B schedule property was in the possession of appellants but question of title was not decided in that suit and as plaint B schedule property forms part of plaint A schedule property, respondent has title to the property and he is entitled to recover possession of the same on the strength of his title. Appellants in their written statement admitted that plaint A

schedule property was originally government land but denied the case that plaint A schedule property was assigned to respondent. It was contended that properties having an extent of 42 cents in R.S.No.1219/2, 20 cents in R.S.No.1219/3, 24 cents in R.S.1219/4 and 1.95 acre of Perdala village belonged to Choma Naik grand father of appellants on tenancy right and B schedule property was adjacent land which lies to the south of the leasehold property and it was also enjoyed as compact block by grand father of appellant and on his death tenancy right devolved to Appu Naik father of respondents and as per order in O.A.94/74 Land Tribunal, Kasargod jenmon right was assigned in favour of their father and plaint schedule property forms part of that property and respondent has no title to the property and even if he has any title it was barred by adverse possession and limitation. It was also contended that the suit is barred by decree and judgment in O.S.131/1987 and A.S.32/95 and therefore respondent is not entitled to the decree sought for.

2. Learned Munsiff framed necessary issues. Only respondent/plaintiff was examined as PW1. Exts.A1 to A7 and Exts.C1 and C2 were marked on his side. On the side of appellants no evidence, either documentary or oral,

was adduced. Learned Munsiff on the evidence found that plaint B schedule property is part of plaint A schedule property and respondent has title to plaint B schedule property under Exts.A1 and A2 issued by Tahsildar. It was also found that appellants failed to establish that the title of respondent was barred by adverse possession and limitation and granted a decree. It was challenged before Sub court, Kasargod in A.S.17/03 by appellants. Learned Sub Judge after re-appreciation of evidence confirmed the decree and judgment and dismissed the appeal. This second appeal is filed challenging the concurrent findings of courts below.

3. Learned counsel appearing for appellants was heard.

4. Arguments of learned counsel appearing for appellant was that when respondent was examined as PW1 he admitted from the box that appellants are in possession of the property for 20 years and therefore courts below should have found that appellants are in possession of plaint schedule property for more than requisite period and that too hostile to respondent and therefore title of respondent was barred by adverse possession and limitation. Learned counsel also argued that even though appellants were not examined, opportunity should have

been granted for adducing oral evidence and therefore decree and judgment is unsustainable. It was also argued that admission is the best evidence and evidence of PW1 establish that respondent was not in possession of the plaint schedule property for more than 12 years prior to the institution of suit and therefore decree granted by courts below is unsustainable.

5. Learned Munsiff and learned Sub Judge, on appreciation of evidence found that plaint B schedule property forms part of plaint A schedule property. It was also found that respondent has title to plaint A schedule property. That factual findings were arrived at on the evidence on record. Nothing was pointed out to hold that the finding was erroneous or was arrived at ignoring material evidence. Title of respondent to plaint A schedule property therefore cannot be disputed. So also, fact that plaint B schedule property is part of plaint A schedule property cannot be disputed. Then the question is whether title of respondent was barred by adverse possession and limitation as argued by learned counsel appearing for appellants. After enactment of Limitation Act, 1963, under Article 64 of Limitation Act in a suit for recovery of possession on the strength of title plaintiff in addition to his title need not prove that

he has been in possession of the property within a period of 12 years, which was the case under Article 141 of Limitation Act, 1908. After enactment of Act 1963 it is for the defendant to prove that plaintiff was out of possession of the property for more than 12 years prior to the institution of the suit and defendant thereby perfected his title by adverse possession. What was contended by appellant before courts below was that plaint B schedule property is a government land and it was adjoining to the leasehold property, obtained by his grand father and thereafter father and appellants have been in possession of the said property. There is no case for appellants in their written statement that they have been in possession of the property with the knowledge that property belongs to respondent and denying his title or asserting that he is its owner. Though reliance was placed on the admission of PW1 to the effect that defendants have been in possession of the property for 20 years PW1 was not further asked whether that possession was adverse or hostile to the plaintiffs. In the absence of such evidence, courts below were perfectly justified in holding that appellants failed to establish that they have been in possession of the plaint schedule property for more than 12 years and perfected their title by

adverse possession. By continuing possession of property for any number of years, appellants cannot claim that they have perfected their title by adverse possession. None of the defendants were examined to prove that their possession was hostile to true owner. Though learned counsel appearing for appellants vehemently canvassed for a remand for the purpose of adducing further evidence to prove the case of adverse possession, there is no case that opportunity was not granted by the courts below. Even before the appellate court no such prayer was made. In such circumstances, it is too late for the appellants to canvass for an opportunity to adduce further evidence. No substantial question of law is involved in the appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.